IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO (Ord.) No.201 of 2001.

Judgment reserved on: 29.9.2006.

Date of decision: 13.10.2006.

M/s.Shivgana Transport (P) Ltd. And others …..Defendants-Appellants

-Versus-

M/s.Chanana Steel Tubes (P) Ltd. ……Plaintiff-Respondent

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

Whether approved for reporting? No.

For the Appellants: Mr.Bhupinder Gupta, Senior Advocate with Mr.Janesh Gupta, Advocate.

For Respondent : Mr.R.K.Bawa, Sr.Advocate with Mr.Rajpal Thakur, Advocate.

Deepak Gupta, J.

This appeal is directed against the judgment of the learned District Judge, Solan whereby he has rejected the petition filed by the present appellants (hereinafter referred to as the defendants), for setting aside the ex-parte decree passed against them.

The brief facts necessary for decision of the case are that the respondent (hereinafter referred to as the plaintiff) filed a suit for recovery of Rs.4,92,196.30 against the defendants. The suit was filed on 22.2.1996. After the defendants were served and pleadings were complete issues were framed on 3.12.1996 and the matter was listed for evidence of the plaintiff. The plaintiff took a number of opportunities to lead its evidence and finally the evidence of the plaintiff was closed on 26.8.1998. The matter

was adjourned to 5.10.1998 for evidence of the defendants and the defendants were granted 3 days time to file process fee, diet money etc. Admittedly the process fee and diet money was not filed. On 5.10.1998 the members of the Solan Bar were abstaining from court work and the evidence of the defendants was not present and the case was adjourned to 6.11.1998. It was ordered that in case the defendants want the help of the Court for summoning the witnesses they may file their list of witnesses within 3 days. No list of witnesses was filed. On 6.11.1998 neither the defendants nor their counsel was present and the defendants were proceeded against ex-parte and the suit was decreed on the same date.

Thereafter, the appellants-defendants filed an application under Section 154 read with Order 9 Rule 13 CPC for reviewing the judgment and decree dated 6.11.1998 and for setting aside the same. According to the defendants their counsel had telephonically informed them about the date fixed in the case i.e. 6.11.1998. However, as per their version, while noting down the next date the defendants mistakenly noted the date as 16.11.1998 instead of 6.11.1998. The defendants further averred that they told their counsel that they would produce their evidence on the next date and their counsel asked them to contact him a week prior to the date fixed. The case of the defendants is that on 7.11.1998 they rang up their counsel to intimate him that they would be coming to Solan on 11.11.1998 and it was only then that they came to know that case had been fixed for 6.11.1998.

This application was contested by the plaintiff. The learned trial Court did not believe the version of the defendants and dismissed the application for recalling the ex-parte decree. Hence the present appeal.

I have heard Sh.Bhupinder Gupta, learned senior counsel for the defendants and Sh.R.K.Bawa, learned senior counsel for the plaintiff.

According to Sh.Bhupinder Gupta the defendants had not appeared on 6.11.1998 since they had wrongly noted down the date as 16.11.1998. He further submits that the application for setting aside the ex-parte decree was filed on 4.12.1998 within a period of limitation. After the defendants had applied for the copy of the judgment and decree on 11.11.1998 it was received by them on 25.11.1998. He submits that it was a bonafide mistake and the defendants should not suffer.

On the other hand Sh.R.K.Bawa, learned senior counsel for the plaintiff submits that the story set out by the defendants is totally false. The defendants had not taken any steps for summoning the witnesses. He further submits that there is no explanation given as to why the counsel for the defendants did not appear on 6.11.1998 to ask for a date.

A perusal of the entire record shows that the case was first fixed for the evidence of the defendants on 5.10.1998. On this date the members of the Solan Bar were abstaining from work and the case was adjourned to 6.11.1998. This was the second date for the evidence of the defendants but if one discounts the

earlier date on which the members of the Bar were on strike this was effectively the first date for leading evidence by the defendants. Admittedly no steps had been taken by the defendants to summon their witnesses. According to them this was because they had decided to produce their evidence on their own responsibility. Further according to them they wrongly noted down the next date as 16.11.1998 instead of 6.11.1998. The version of the defendants appears to be plausible and correct. However, there is no explanation as to why counsel for the defendants did not appear on the said date. Even if the defendants could not appear on 6.11.1998 the counsel should have at least appeared on this date. However, a party cannot be made to suffer for the negligence of the counsel. The application for setting aside ex-parte proceedings was filed within the period of limitation. In my view there were sufficient grounds to recall and set-aside the ex-parte judgment and decree and permit the matter to be contested on merits.

In view of the above discussion, the appeal is allowed and the order of the learned trial Court dated 1.5.2001 is set-aside. Consequently the order dated 6.11.1998 whereby the defendants were proceeded against ex-parte is also set-aside and the judgment and decree of the said date passed against them in Civil Suit No.4-S/1 of 1998 is set-aside. However, this is subject to payment of Rs.5000/- as costs which costs be paid to the Solan District Bar Association for purchase of books. The costs shall be deposited/paid to the District Bar Association Solan on or

before 27th November, 2006. The parties through their counsel are directed to appear before the learned trial Court on 27th November, 2006 on which date he shall fix a date for the evidence of the defendants. Since even according to the defendants they had to produce the evidence on their own responsibility, the defendants shall produce their evidence on the date so fixed at their own responsibility and they shall not be granted any further opportunity to lead evidence. Keeping in view the fact that the original suit was filed as far back as in the year 1996 it is ordered that the learned trial Court shall hear the matter with utmost dispatch and shall dispose of the suit as early as possible and in any event not later than 31st March, 2007.

The appeal is disposed of in the aforesaid terms.

October 13, 2006. **(Deepak Gupta),**
PV **Judge**